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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Global Business and Legal Services

File: B-290381.2

Date: December 26, 2002

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DIGEST

Protest challenging evaluation of protester's proposal is denied where record shows that agency evaluated proposal in accordance with the solicitation criteria, and that its conclusions were reasonable.

DECISION

Global Business and Legal Services protests the rejection of its proposal under request for proposals (RFP) No. RP-31ME-2-0001, issued by the Rural Development Agency, Department of Agriculture, for legal services. Global argues that the agency improperly evaluated its proposal.

We deny the protest.

The RFP, issued February 22, 2002, contemplated the award of multiple indefinite-delivery, indefinite-quantity contracts for nationwide legal services for a base year, with 4 option years. The legal services required are specific to the work performed by the Rural Utilities Service. The RFP required that the contractor, "as a minimum, maintain legal expertise in the following practice areas: corporate, tax, bankruptcy, project finance, real estate, and energy law applicable to electric utilities," and stated that "[a]dditional expertise in laws applicable to cooperatives, environmental law and secured transactions may be required." RFP § C.3.1. Section L of the RFP required that proposals include key personnel and corporate resumes, and that the key personnel resumes indicate, among other things, education, background, recent (within the past 5 years) experience, and specific professional or technical accomplishments. Under the heading "Relevant Experience," the RFP required that technical proposals include evidence that the

offeror has “extensive experience of being involved at least one third of the time over the past three (3) years in the following practice areas: 1) corporate, 2) project finance, 3) lease transactions, and 4) applicable tax law.” RFP § L.8(B)(1). The technical proposal also was to “include a brief overview of the partner and associate level staffing depth for each of the applicable practice areas listed in Section C.” Id.

Award was to be made to the responsible offeror whose technically acceptable proposal offered the best value to the government based on the following evaluation factors (and subfactors): technical (relevant experience, staffing, subcontracting), past performance, and price. The three evaluation factors were equal in importance, and the first two technical subfactors were more important than the third. The RFP noted that award may be made to other than the lowest cost proposal based on superior technical features, predominately focusing “on the amount of ‘extensive experience’ held by key personnel and corporate technical expertise.” RFP § M.1(d).

Twelve proposals, including Global’s, were received by the March 25 closing time. A four-member technical evaluation panel (TEP) evaluated the proposals by assigning them an adjectival rating of exceptional, acceptable, marginal, or unacceptable under each factor and subfactor. Eight of the proposals were rated technically acceptable; four, including Global’s (ranked tenth technically) were rated technically unacceptable. Global’s unacceptable technical rating was based on its unacceptable rating under the staffing and relevant experience technical subfactors; it was rated exceptional for past performance, and received a high performance risk rating.

Regarding relevant experience, the TEP found that Global’s proposal demonstrated no significant utility or energy transactional experience, no rural electric cooperative utility experience or energy financing experience, and no depth in the required fields of bankruptcy, tax, environment, project finance, or energy law, as applied to electric utilities. As for staffing, the TEP’s evaluation noted that Global’s proposal is “really about one limited person rather than a broad based law firm” and that the person’s experience “is extremely limited in the energy or utility transactions.”¹ Agency Report (AR), Tab G, TEP’s Final Memorandum, at 5. The TEP recommended award to the eight offerors with acceptable technical rankings, and the contracting officer, following the TEP’s recommendation, awarded contracts to these eight companies. After a September 23 debriefing, Global filed this protest.

Global argues that the RFP’s use of the word “applicable” in describing the required legal expertise—where the RFP required expertise in corporate, tax, real estate and energy law “applicable” to electric utilities—was misleading. The protester asserts that, while the agency apparently intended the word to indicate that expertise—for example, in corporate and tax law—was to be related to electric utilities, it was not

¹ It appears that the agency used the terms “expertise” and “experience” interchangeably in evaluating the proposals.

apparent that this narrow definition was intended. In this regard, Global notes that Webster's dictionary defines "applicable" as "capable of being put to use or put into practice." Protester's Comments at 2-3. Global claims that its proposed key personnel's expertise in the specified areas, while not related specifically to electric utility work, nevertheless can be applied to electric utilities.

This argument is without merit. Simply put, we think that the term "applicable," used in reference to required expertise in the context of a solicitation for electric utility-related legal services, was sufficient to convey an intent by the agency to evaluate electric utility-related expertise. The protester's contrary view is flawed because it would accord the term "applicable" no effect. In this regard, since the areas of law identified in the RFP are general in nature (e.g., tax, corporate, bankruptcy), they already are "capable of being put to use or put into practice" in the area of electric utilities; there thus would have been no reason for the agency to use the term "applicable" in describing the required areas of expertise. In contrast, under the agency's interpretation, the term "applicable" was necessary to alert offerors to the need for their expertise to be related, or relevant, to electric utilities. We note that the dictionary lists the word "relevant" as synonymous to "applicable." See Webster's Dictionary at 97 (9TH ed. 1987). We conclude that the agency reasonably downgraded Global's proposal for lack of electric utility-related expertise.²

Global argues that the agency improperly found that its proposal did not demonstrate relevant experience. It recites the experience of its key personnel in its protest submissions, and notes that its proposal showed additional experience in cooperatives, environmental law and secured transactions.

The evaluation of technical proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method of accommodating them. Mesa, Inc., B-254730, Jan. 10, 1994, 94-1 CPD ¶ 62 at 5. In reviewing an agency's technical evaluation, we will not reevaluate the proposals; rather, we will examine the record to ensure that the evaluation was reasonable and consistent with the RFP evaluation criteria and applicable procurement laws and regulations. Id.

The evaluation here was unobjectionable. The record shows that Global offered four key personnel, including a senior partner, junior partner, senior associate and junior

² Even if the protester were correct that the solicitation did not require legal expertise or experience relating to electric utilities, the agency properly could rate Global's general experience unfavorably compared to other offerors' specific experience. See Chant Eng'g Co., Inc., B-280250, Aug. 7, 1998, 98-2 CPD ¶ 38 at 4.

associate.³ As noted in the agency's evaluation, we find little or no utility, environmental, energy, or cooperative law expertise, and no depth of expertise, as required by the solicitation. There also is nothing to suggest that the protester has extensive experience in the specified areas of the law as they relate to cooperatives or electric utilities. Indeed, while the proposed senior partner appears to have some amount of the required expertise, the other three proposed attorneys have little; two have tax and corporate law experience unrelated to electric utilities or cooperatives, and one has experience with gas utility rather than electric utility law. While Global makes the general statement that its personnel have expertise in cooperatives, environmental law and secured transactions, it does not point to anything specific in its proposal to support this contention, and does not specifically rebut the agency's determination that it lacks depth of experience in the areas of law required under the RFP. Based on this record, we have no reason to object to the evaluation of Global's proposal.

Global argues that, since it is a small business, the agency was required to refer the rejection of its proposal to the Small Business Administration (SBA) for Certificate of Competency (COC) review. Protester's Comments at 6. However, traditional responsibility factors, such as experience, may be used for the comparative evaluation of proposals in relevant areas; where a proposal is determined to be deficient pursuant to such an evaluation, the matter is one of relative technical merit, not responsibility, and does not require a referral to the SBA. See Advanced Resources Int'l, Inc.-Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348 at 2. The agency here found that Global lacked adequate required expertise, and downgraded its proposal in the technical evaluation. Since this was not a nonresponsibility determination, no referral to SBA was required. See Micronesia Media Distributors, Inc., B-222443, July 16, 1986, 86-2 CPD ¶ 72 at 2.

³ There was some confusion over the evaluation of the protester's key personnel resumes, as revealed during the development of the protest record. While the agency evaluated their experience based on information included in Global's proposal, it was not aware that Global had submitted actual resumes. This was because, while Global submitted copies of its technical proposal in plastic sheaths at the front of a three-ring binder, it provided the resumes outside of the sheathed copies, as separate, loose papers in the back of the binder. Since the proposal itself included experience information, the agency assumed that this was the "resumes," and did not search through the binder for actual resumes. Although Global asserts generally that it was "substantially and irrevocably damaged" by the agency's failure to review its résumés, Protester's Supplemental Comments, Nov. 15, 2002, at 2, it is not apparent how this could be. In this regard, the proposal that the agency evaluated largely repeated the experience information in the resumes, and Global points to no information in the résumés that addressed the concerns that led the agency to downgrade its proposal.

The protester also asserts that, because its past performance rating was exceptional, its technical capability rating should have been at least acceptable, since past performance demonstrates that it possesses the technical capability and expertise to perform the work. Protester's Comments at 4. This argument also is without merit. The evaluation of Global's proposal under the two evaluation factors need not be the same, since the factors assessed different things: while Global's past performance rating indicated exceptional performance on prior contracts, its unacceptable rating under the technical factor indicated a lack of required expertise that the agency determined was necessary to perform this specific requirement. Thus, Global's proposal's different ratings under the two factors were reasonable.

Finally, the protester complains that the agency should have set the procurement aside for small business, improperly failed to evaluate the subcontracting plans of the other offerors, and was biased against small businesses.

Global's set-aside argument is untimely. Under our Bid Protest Regulations, protests based upon alleged solicitation improprieties (such as the failure to set a procurement aside for small businesses) must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (2002). Global did not raise this argument until after award. Global's subcontracting plan argument is without merit; the record shows that the agency did evaluate the subcontracting plans. See AR, Tab G, TEP Final Memorandum. As for Global's allegation of bias, government officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Triton Marine Constr. Corp., B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171 at 6. Here, there is no evidence of bias or bad faith on the part of the agency.

The protest is denied.

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General Counsel